

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28
BEFORE THE DIVISION OF ADMINISTRATIVE LAW JUDGES

MALCO ENTERPRISES OF NEVADA, INC. d/b/a
BUDGET RENT A CAR OF LAS VEGAS

AND

Case 28-CA-213222

FRANCINE SCOLARO, an Individual

RESPONDENT'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

James J. McMullen, Jr.
Joseph P. Sbuttoni, III
Gordon Rees Scully Mansukhani LLP
Attorneys for Respondent
101 W. Broadway, Ste. 2000
San Diego, CA 92101

A. STATEMENT OF THE CASE

Malco Enterprises of Nevada, Inc. d/b/a Budget Rent a Car of Las Vegas (“Respondent” or “Budget”) discharged Charging Party Francine Scolaro (“Scolaro”) for her admitted repeated refusal to follow Budget’s lawful employee work rules regarding employee conduct in customer service areas. She also made dishonest, potentially damaging statements in these areas in violation of said policies, further warranting her dismissal. The General Counsel failed to prove at trial that either the discharge or Budget’s work rules violate the National Labor Relations Act (“NLRA” or the “Act”). *See The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017).

Instead, the evidence presented, including Scolaro’s own testimony, demonstrates Budget terminated her for reasons entirely unrelated to any alleged concerted activity. Indeed, her claim that she engaged in such activity is questionable at best. Additionally, the work rules at issue do not infringe upon or prohibit any activity otherwise protected under the NLRA. As such, Respondent respectfully requests Scolaro’s Complaint be dismissed in its entirety.

B. INTRODUCTION AND GENERAL BACKGROUND

Budget is an independent, family-owned rental car franchise that operates a retail counter at the Las Vegas airport. This location is always subject to heavy competition as a multitude of Budget competitors are in direct proximity to Budget. As a result, Budget must compete for the customers seeking rental cars or other ground transportation options at Las Vegas International Airport.

Budget recognizes its ability to compete, if not survive, directly hinges on its ability to retain existing customers while attracting new ones. In order to distinguish itself from other rental companies, Budget identifies, actively prioritizes, and promotes customer service as the lifeblood of its organization and the key to its success in this cutthroat industry. To achieve this, Budget has in place reasonable employee standards of conduct (which are especially crucial in areas customers can observe). One such rule prohibits “insubordination or refusal to comply with instructions or failure to perform reasonable duties which are assigned.” This along with Budget’s other such rules are critical elements to its long-term business strategy and success.

Quite simply, Budget is well aware and never discounts the fact that its customers have many choices for transportation options in Las Vegas; indeed, it simply cannot afford to.

Charging Party Scolaro, on the other hand, precipitated and caused disruptions in customer service areas on several occasions via insubordinate, provocative, disruptive, and disingenuous behavior. As a result, Budget lawfully terminated her given her repeated refusal to abide by Budget's lawful rules of employee conduct. Such misconduct culminated in an incident that could have been especially damaging to Budget's business due to the prevalence of and reliance on social media and customer-generated reviews in today's marketplace.

Based on the evidence in the record and the credible testimony adduced from Budget management personnel at trial, Budget maintains Scolaro's Complaint should be dismissed in its entirety. The General Counsel failed to prove, by a preponderance of the evidence, that either Scolaro was disciplined and terminated in retaliation for any supposed protected concerted activities as defined by the NLRA or that Budget's reasonable work rules regarding employee conduct are unlawful under the Act. As such, dismissal is warranted for all allegations by Scolaro, which is discussed in further detail below.

C. BUDGET'S BUSINESS OPERATIONS AND CORPORATE BUSINESS DEAL FOR COSTCO CUSTOMERS

Budget's rental car customers visit Las Vegas from "all over the world." (NLRB Hearing Transcript ("TR") at p. 235:24). Given many of its customers have already spent a significant amount of time traveling great distances, Budget is keenly aware that its customers desire an "easy rental" process given they "want to just... move on, get out of there." (TR at p. 237:10-11.) Indeed, Scolaro admitted her understanding that good customer service is the "bread and butter of the business." (TR at p. 141:22.)

As part of a corporate effort to expand its customer base, the Avis Budget Group ("AVB") negotiated a "multi-million dollar contract" with retail giant Costco for special rates and perks exclusive to Costco customers who rent cars through Budget. (TR at p. 236:5.) The exclusive perks available to Budget customers who book through Costco include a discounted

rate, free upgrade “to the next class up” for their rental, and, possibly most important, an expedited, dedicated customer service line. (TR at p. 236:25, 237:1-4.)

Following implementation of the Costco promotion, Budget became the single busiest rental location for the Costco customers out of all franchises. (TR at p. 236:6.) In order for Budget to maintain such status and continue to offer the Costco partnership deal, it must meet certain “requirements”, which are critical to the overall success of the deal itself. (TR at p. 236:5-7.) More specifically, “customer service” and “moving the [Costco] line” are vital elements for Budget to continue to operate the Costco promotion effectively. (TR at p. 236:22.)

In November 2017, AVB renegotiated the deal with Costco. As a result, in late 2017/early 2018, Budget was actively attempting to figure out the best way to implement the new promotion and “serve the critical Costco customers in the best way possible.” (TR at p. 153:11-13.)

D. BUDGET’S MANAGEMENT STRUCTURE AND WITNESSES AT TRIAL

As discussed more fully below, the General Counsel can only prevail on Scolaro’s behalf if he can prove Scolaro engaged in concerted protected activity by acting “by or on behalf of” at least one other employee. Yet, the General Counsel elected to only call Scolaro as a witness and did not call any other rank-and-file employees of Budget in support of alleged group activity. Instead, the General Counsel only called management-level employees as witnesses at trial.

Despite none of these individuals being “experienced” witnesses, each testified truthfully and to the best of their abilities. They opined on Budget’s operations as well as its policies (including but not limited to Budget’s focus on and the importance of customer service), the events giving rise to several instances of Scolaro’s discipline and termination, and the company’s investigation of the applicable incidents and deliberations regarding appropriate disciplinary measures.

For ease of reference throughout this brief, Budget provides an outline of the management witnesses and a summary of the pertinent testimony garnered at trial:

1. Rosalie Perez, Front Counter Supervisor (“Perez”)- As a supervisor, Perez’s responsibilities include, but are not limited to, organizing and creating the customer service representative (“CSR”) “break schedule” on a shift-by-shift basis (TR at p. 46:6-7.) Ensuring CSR breaks are staggered (and taken in such a manner) is critical in order to preserve customer service continuity and minimize instances of customer assistance shortfalls at any given time. (TR at p. 45:21-10.) Although Perez holds a supervisory position at Budget, she also, at times, will “jump in” and assist customers at the front desk to help CSRs during periods of significant customer influx and in order to maintain optimal customer service.

For customer service and general compliance reasons, front counter supervisors, such as Perez, are required to keep track of CSRs when they step away from the counter. They do so as servicing customers at the front counter is their key responsibility. (TR at p. 147:4-19.) Thus, it is critical to ensure the front desk staff is never short-staffed, which would, if allowed to happen, result in significant customer waiting lines, customer dissatisfaction, and subpar customer service. (*See id.*) Yet, as demonstrated through the testimony at hearing, Scolaro resented Perez for performing such duties and repeatedly acted insubordinate and rude towards her when Perez simply wanted to know Scolaro’s whereabouts.

In June 2017, Scolaro angrily contested and even scolded Perez for Perez’s attempt to try to keep track of her whereabouts and provide reasonable work-related instructions. (TR at p. 98:12-99:9; 99:25-100:2; 150:9-13.) This culminated in Scolaro telling Perez to leave her “the fuck” alone even though, as Scolaro admits, Perez was “just doing her job.” (TR at p. 201: 6.) Given the highly inappropriate Scolaro’s interaction with her direct supervisor, Budget rightfully disciplined Scolaro via a written warning. (TR at p. 200: 24) Then, in September 2017, Scolaro upbraided Perez (despite Perez being Scolaro’s supervisor) in front of a “lobby full of customers.” (TR at p. 48:5-49:25.) This unprofessional behavior in the presence of customers resulted in Budget issuing Scolaro a verbal warning. (TR at p. 68: 21.)

Despite the above, Scolaro failed to heed these warnings and did not correct her insubordinate and unacceptable behavior. In January 2018, Scolaro repeatedly engaged in insubordinate behavior towards Perez and other management personnel, including Montecino, when she refused to return an email not meant for her consumption. (TR at p. 29:10-30:20.) As discussed in greater detail below, this incident and her inappropriate actions involved in same ultimately led to her termination.

2. Michael Montecino, Station Manager- Michael Montencino (“Montecino”) oversees Budget’s counter supervisors, including Perez. As described in further detail below, Montecino repeatedly requested Scolaro give him the email not meant for her consumption, but Scolaro repeatedly refused. (TR at p. 29:10-30:20.) She then falsely accused Montecino of asking her to provide him a document stashed “in [her] bra” in front of customers. (TR at p. 39:9-40:4.) Montecino ultimately sent Scolaro home for these clear acts of dishonesty and insubordination and sent an email to Budget management memorializing the incident. (TR at p. 63: 14-16.)

3. Laura Sottile, Customer Relations Manager (“Sottile”)- Sottile is Budget’s dedicated Customer Relations Manager. (TR at p. 75:22-23.) She directly manages Budget’s staff of customer service and retention employees and intermittently works the front counter to assist with customers. (TR at p. 75:24-76:19.)

Sottile witnessed Scolaro loudly berating Perez in September 2017 and authored the disciplinary write-up issued as a result. Sottile also drafted the January 8, 2018 Suspension Report regarding the January 7/“email” incident involving Scolaro and discussed appropriate disciplinary measures for Scolaro based on same with JT and Paul Ocampo (“Ocampo”), General Manager of Budget, the other two members of Budget’s upper-management team. (TR at p. 232:17-19: “I collaborated with J.T., Paul and I during the suspension process to decide where we go as far as what we do in this particular case. And we decided to terminate.”)

4. Joselito Reyes, Sales and Training Manager, and Paul Ocampo, General Manager-

JT is Budget's Sales and Training Manager. He reports directly to Ocampo, Budget's General Manager. Following Scolaro's suspension pending investigation in early January 2018, and consistent with Budget's disciplinary procedures, JT investigated Scolaro's latest incident on January 7, 2018 and reviewed her prior work history and disciplinary issues. (TR at p. 237: 17-20 .) JT spoke with Montecino and Perez regarding the facts surrounding the January 7 event and collaborated with Sottile and Ocampo to determine the appropriate discipline for such action. (TR at p. 66:13-16 "It was a group decision from me, the training, the sales manager; Laura Sottile, which is customer service manager; and Paul Ocampo, which is the operations manager.") The three members of Budget's management ultimately decided to terminate Scolaro, with JT drafting Scolaro's Separation Report. (TR at p. 237:17; GC Ex. 9).

E. SCOLARO'S DISCIPLINARY WARNINGS FOR INSUBORDINATE AND/OR ABUSIVE CONDUCT

As noted above, Scolaro received several disciplinary warnings during her employment for insubordinate and blatantly rude/unprofessional behavior towards Perez (her supervisor) and in front of customers. Perez, as a Front Counter Supervisor, is responsible for ensuring CSRs adhere to the designated break schedules she creates, and that there are an adequate number of CSRs available to service the customers at any given time. (TR at p. 147: 6-8 .) On June 26, Perez sought to locate Scolaro, who was on-duty but absent from the front counter. Unbeknownst to Perez, Scolaro was in the bathroom. (TR at p. 149:5-16.) After Scolaro exited the restroom, Perez asked her to return to the counter. Scolaro responded by yelling at Perez to "leave her the fuck alone." (TR at p. 150:10-11.) Budget issued her a disciplinary warning for this inappropriate and abusive outburst.

In September 2017, Perez requested an employee return a chair to another employee who had just come back from break. (TR at p. 48:8-12.) Rather than allowing Perez and the employees involved to handle the situation, Scolaro, while working at the front desk, loudly scolded Perez in front of a manager as well as a "lobby full of customers" to not be "rude" to her subordinate. (TR at p. 48:13-18.) Pursuant to its policies and procedures, and because of this misconduct, Budget issued Scolaro another disciplinary warning.

Indeed, at trial, Scolaro admitted employee Rao Ali (the one Perez asked to return the chair) never asked or authorized her to speak on his behalf. (TR at p. 151:25-152:5.) In fact, her and Ali never discussed this event. (*Id.*) Her remaining testimony about this event was inherently inconsistent, unreliable, and should be disregarded. For example, although she was aware Budget cited her for disruptive behavior in a customer service area, rather than filing a complaint with the company, Scolaro testified she upbraided Perez in the quietest way possible:

I kind of whispered without my lips moving and said Ro, you sound real rude, you shouldn't do that, especially in front of customers.

(TR at p. 117:22-24.) This explanation makes little sense. She is basically claiming she was talking without her lips moving, which is contradicted by her demeanor at trial. As such, this exposition appears to be nothing more than an attempt to shape the facts to fit “her” story (and the General Counsel’s legal theory).

Scolaro further undermined her credibility when she claimed there were actually “no customers present” for these events; yet, nearly in the same breath, she admitted Sottile was “busy with a customer” at the time it occurred. (*Compare* TR at p. 135:10 with p. 135:11.) As such, according to Scolaro, Sottile “did not hear everything” that was said, just Scolaro’s outburst. (TR at p. 135:12.)

F. SCOLARO’S HIGHLY INAPPROPRIATE BEHAVIOR IN JANUARY 2018 AND RESULTING TERMINATION

Despite Budget’s warnings to Scolaro, she apparently never fully appreciated the significance of these counselings and never used such opportunities to correct her behavior.¹ In January 2018, Perez provided Scolaro an email issued to management from JT Reyes, Budget’s Sales and Training Manager. (TR at p.54 : 7 .) The email stressed the importance of CSRs actively assisting customers regardless of the “type” of customers in line, prepaid/Costco versus non-Costco. (Exhibit 2- Jan. 3, 2018 Email.) JT informed management, via this email, that if he witnessed a customer standing in any line not being helped by an available/free CSR, there

¹ Although Budget made many accommodations for Scolaro’s various medical issues, cursing at a supervisor was not one of them. (TR at p. 151: [To Scolaro] “were they required to let you curse at a supervisor? A: No.”)

would be “grave” consequences (apparently indicating he would have that CSR and the manager/supervisor on duty work the night shift). (*Id.*; TR at p. 50:13-25.) Perez recounted the essence of this email to her team, which Scolaro overheard. (TR at p. 53:5-20.) Scolaro challenged her on this (as she had a propensity to try to undermine Perez at seemingly all possible opportunities), resulting in Perez providing her JT’s email as “proof” in order to maintain a level of trust with her team members, including Scolaro. (TR at p. 53:5-54:4.)

Despite Perez’s seemingly good intentions, JT’s email did not represent nor contain an officially adopted Budget policy or even one ready for employee distribution or implementation. (TR at p. 30:3-25.) Thus, it was not meant to be distributed amongst all employees but, instead, was intended to be for managers’ eyes only who, in turn, could generally emphasize the importance of customer service to their team members. (*Id.*) As a result, Perez along with Montecino, the Station Manager, requested Scolaro return the email Perez previously provided to her several times, with Scolaro refusing each time. (*See, e.g.*, TR at p. 29:18-22, 31:10-16.)

Perez, after a discussion with Montecino, first approached Scolaro in hopes of retrieving the email. Scolaro refused this initial attempt:

Q: . . . what happened when you tried to get it back from Francine?

A: She said she was with a customer and that didn’t feel right that I was behind her; she didn’t feel comfortable. So I said, okay, and I left.

(TR at p. 228:12-22.) Montecino then requested Scolaro provide the email to him, which she refused to do. He subsequently asked Scolaro to not call any more customers while working at the front desk during this time period so she could discuss the issue with him in the back office. (TR at p. 31:10-32:9.) She disobeyed this and all such other similar requests. Ultimately, she only gave the email back to him when she decided it was time to and after falsely claiming in front of customers that she had stashed it “in [her] bra” as well as posting it on a management bulletin board and taking a picture of it as a further act of defiance:

Q: [To Mr. Montecino] All right. So you asked Rosalie to go do what?

A: To go let Francine know to give me the e-mail or to come back to the back office to give me the e-mail.

Q: All right. And the what happened?

A: Monitored through the window. I saw her calling up a customer another time. That's when I was calling downstairs to ask another manager to come upstairs.

Q: And that was Joe Alfaro?

A: That's correct.

Q: All right. So what happened then?

A: When she finished with that customer, I walked out towards Francine with Joe behind me and Rosalie a little behind him to ask for the e-mail. She already was in the process of calling a customer. When I- while the customer was starting to come up, I said, please give me the e-mail and help this customer out or you'll have to come to the back with me and Rosalie can take over the contract.

...

Q: All right. And then what happened?

A: Right when the couple, the customer came up, she said, in a loud voice, do you want me to take this memo out of my bra in front of everyone and made hand gestures, looking at the customers. The customers looked at me very awkwardly. I looked at her. I said, the memo's in your front pocket, but let's not talk about that. Let's go back to the office now, please. And I said Rosalie, can you please take over the contract?

Q: And what happened after that?

A: We proceeded towards the back office. I was first. Joe was right behind me. Francine was coming through the door, she pulled the memo out of her front pocket or the message out of her front pocket., and she said all because of this little piece of paper, stuck it to the bulletin board where the regular memos go, and proceeded to take a picture of it.

Q: all right. Did you say anything to Francine at that time?

A: I said Francine, you know that memo was in your front pocket. What you did in front of customers was inappropriate. You should have never said anything like that. You put both the Company and myself in a position to be placed on social media...

(TR at p. 217:3-218:22.) Given Montecino witnessed Scolaro place the email in her front pants pocket earlier that day when she initially refused to give the document back to him, he knew she was not being truthful about the email being stored in her bra. (TR at p. 36:5-12; 40:13-18.)

In response to Scolaro's highly inappropriate, insubordinate, and dishonest behavior, Montecino ordered her to clock out and go home and drafted an email to Budget's management regarding Scolaro's misconduct. Even though, in a post hoc manner, Scolaro crafted a cover story for her insubordination based on a nonsensical customer service concept, she admitted she actually "turned her back on her customers" in order to refuse to return the email to Montecino. (TR at p. 154:16-17.) In all, she admitted, at trial, that she refused to return the email upon request from a supervisor four separate times (two from Perez and two from Montecino). (TR at p. 152:21-24.)

Budget suspended Scolaro pending investigation. JT then conducted the investigation, which included interviews of and discussions with those present at the time. He also worked with Montecino and Ocampo to decide what discipline was warranted. Consistent with page C-2 of the Employee Handbook, the group considered "the seriousness of the infraction," Scolaro's "past record" and "the circumstances surrounding" the January 7, 2018 incident in making the disciplinary decision. (TR at p. 68: 15-16 ; GC Ex. 9.) Given the severity and location of the incident on January 7, 2018 as well as her history of engaging in such conduct, the three management employees decided to terminate Scolaro. JT drafted Scolaro's separation report, which confirmed Scolaro's termination was based on her violation of Budget's policies and procedures. This included the policy prohibiting "[i]nsubordination or refusal to comply with instructions or failure to perform reasonable duties which are assigned... Conduct which the Company feels reflects adversely on the employee or Company, (as per Company Handbook (appendix C, pg. c2 & c3))." (GC Ex. 9)

G. LEGAL ANALYSIS AND CONCLUSIONS:

Budget's lawful right to value and promote exceptional customer service as a fundamental principle of its retail car rental business is at the very core of this case. Yet, the

General Counsel's Complaint is attempting to substitute the government's business judgment for Budget's committed business decisions to:

- (1) serve its retail car rental customers in an efficient and professional environment;
- (2) foster that environment using lawful employee conduct rules to regulate (among other items) unprofessional, dishonest, and insubordinate employee behavior, particularly in customer service areas/in view of customers; and
- (3) apply those workplace conduct rules in order to discharge an employee who has repeatedly engaged in profane outbursts, acts of insubordination, and dishonesty in front of retail customers.

Regardless of the allegations in this case from an over-zealous General Counsel, the NLRB recognizes Budget's right to conduct its business based on its own lawful business judgements. Thus, the Complaint's allegations that Budget's lawful business decisions and lawful employee conduct rules violate Section 8(a)(1) of the Act are without merit.

1. The Maintenance of Work Rules Regarding Civility and Productivity in this Case Was Not Unlawful under the Act

Bucking the current trend of NLRB law in support of an employer's right to issue discipline and maintain productivity in the workplace, the General Counsel has alleged the following work rules are unlawful, either in their maintenance or application to Scolaro in this case:

"[E]mployees should never speak negatively about one another on front of others whether it be customers, peers or management";

"What is expected of Budget Rent a car & Sales Employees... Always conduct him or herself in a polite, professional manner, treating customers and co-workers courteously and respectfully";

"[I]nsubordination or refusal to comply with instructions or failure to perform reasonable duties as assigned"; and

"[C]onduct which the company feels reflects adversely on the employee or company"

Although, for many years, these types of policies were under fire and the subject of many General Counsel complaints and NLRB legal opinions, the NLRB, in *The Boeing Company*, 365 NLRB No. 164 (Dec. 2017), issued a decision in stark contrast to such "precedent". In *Boeing*,

the NLRB revisited these types of cases and replaced the underlying, largely academic analysis set forth in each with a more commonsense approach: “[w]e do not believe that when Congress adopted the NLRA in 1935, it envisioned that an employer would violate federal law whenever employees were advised to ‘work harmoniously’ or conduct themselves in a ‘positive and professional manner.’” *Boeing*, supra, at p. 3 citing *2 Sisters Food Group, Inc.* 357 NLRB 1816, 1817 (2011) and *Hills & Dales General Hospital*, 360 NLRB 611, 612 (2014).

Based on its newfound approach, the *Boeing* Board announced to the extent the Board in past cases has held that an employer violated the act in maintaining or promulgating employer work rules “requiring employees to foster harmonious interactions and relationships or to maintain basic standards of civility on the workplace, those cases are hereby overruled.” *Id.* Indeed, reaching back to then-member Miscamarra’s dissent in *William Beaumont Hospital*, 363 NLRB No. 162 at 1 (2016) (incorporated by reference in *Boeing* at p. 5, n.15), the Board cited the following as examples of civility rules from prior cases that are now lawful under the NLRA, overruling prior precedent:

“Rude, discourteous or unbusinesslike behavior is forbidden.”

“Disparaging, or offensive language is prohibited.”

“Employees may not post any statements, photographs, video or audio that reasonably could be viewed as disparaging to employees.”

Cellco Partnership d/b/a Verizon Wireless, 365 NLRB No. 38, at 11-12 (2017). In fact, the Board reasoned employees are capable of exercising their Section 7 rights without insulting their co-workers, so the impact of rules forbidding disparagement is “comparatively slight.” *Cellco Partnership*, supra, at 12.

Additionally, *Boeing* also confirmed “board precedent dating back more than 70 years” that “[w]orking time is for work.” Thus, an employer such as Budget has a legitimate and substantial interest in preventing insubordination or non-cooperation at work. *See Boeing Co.* slip op. at 7, n.30 citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Furthermore, during

working time, an employer has every right to expect employees to perform their work and follow directives. *Id.*

Thus, despite the General Counsel's assertions, in actuality, none of Budget's rules violate the NLRA. None are actually aimed at or seek to preclude Section 7 rights. Indeed, the General Counsel has not set forth any cognizable evidence demonstrating this. Instead, all are intended to only lawfully regulate employee civility and promote workplace harmony in the interests of the business, its customers, and its employees, which are considered lawful under the NLRA. Budget's expectations that its employees, including Scolaro, will adhere to such rules and not engage in insubordination is reasonable and acceptable under *Boeing*.

Overall, Budget has a legitimate interest and even "undisputed" right "to maintain discipline" in its workplace as well as regulate employee conduct, especially in its critical customer service areas. *See Boeing* at p. 8. As such, given the employee conduct rules wrongly attacked by General Counsel in this case simply serve that interest, the Complaint allegations concerning Budget's work rules should be dismissed.

2. Budget's September 2017 Discipline and January 2018 Termination of Scolaro Were due to Her Workplace Misconduct in a Customer Service Area, and the General Counsel Failed to Prove Either Violated Section 8(a)(1) of the Act

Scolaro's protected concerted activity is devoid of any actual substance or merit and simply crumbled at trial. The testimony garnered at trial proves Budget disciplined Scolaro in September 2017 and terminated her in January 2018 because of her own workplace misconduct and insubordination, rather than due to any type of union-related activity.

Ultimately, in taking the aforementioned personnel actions against her, Budget simply applied its own lawful employee conduct rules (again, wrongly and baselessly attacked by General Counsel in this case) to the conduct and work history of Scolaro. It decided her conduct blatantly violated such rules, thereby warranting her termination. Indeed, the General Counsel has failed to even make out a prima facie case of discrimination based on protected concerted activities as he cannot link her alleged protected concerted activity (let alone establish she really even engaged in such activity) to Budget's employment-related decisions. As such, he cannot

overturn or even call into question Budget's clear legitimate business reasons for disciplining and discharging Scolaro. As such, Scolaro's Complaint allegations to the contrary should be dismissed in their entirety.

To establish that any adverse employment action taken by Budget in this case violates Section 8(a)(1) of the Act, the General Counsel must demonstrate that Scolaro engaged in activity by or on behalf of another employee (ie that is "concerted" within the meaning of Section 7 of the Act; that Budget knew of the concerted nature of the employee's activity \, the concerted activity was protected by the Act, and that Budget's discipline or termination of Scolaro was motivated by the protected concerted activity. See, eg. *Station Casinos, LLC*, 358 NLRB No. 153 at 18-19 (2012). The General Counsel in this case failed on all counts!

Scolaro was admittedly not acting "by or on behalf" of any other employee either when she berated Rosalie Perez in a customer service area, nor was she acting on behalf of anyone else when she proclaimed that a management e-mail was "in her bra" in front of customers, turned her back on those same customers, and refused at least 4 separate management requests to return that document... and why did she cause this awkward and unprofessional scene in front of customers?? Simply because she (herself) "had not read" the document. (TR)

And there is absolutely no evidence in the record that Scolaro performed these acts of misconduct or insubordination on behalf of anyone but herself, no conversations with any other employees and no call to arms, and no expression of group or concerted activity, much less any evidence that Budget had knowledge of same. To the contrary, Scolaro wanted to pick and choose which Company work rules and directions she wanted to follow, and did not want to return the management e-,mail simply because she herself had not read it!

However, even if the Board finds that The General Counsel made a prima facie showing of all of these elements, the allegations should still be dismissed as Budget demonstrated, by a preponderance of the evidence, that it would have disciplined and discharged Scolaro because of her misconduct and insubordination even in the absence of any protected concerted activities,

just as it did in the recent discharge (for insubordination) of Donna Vilmenay. (TR)
insubordination. *See, e.g. Hoodview Vending Co.*, 359 NLRB No. 36, at p. 5 (2012).

H. CONCLUSION

In recent case law, apparently ignored in this case by the General Counsel, the NLRB has vindicated an employer's right to expect employees to conduct themselves in a civil, professional manner in the workplace, and to maintain and promulgate reasonable rules to support those expectations. The NLRB also recognizes an employer's right to enforce its lawful rules prohibiting employee misconduct and insubordination. Budget's work rules, and the discipline and termination of Scolaro were perfectly lawful under these standards.

Based on the facts and law discussed herein as well as the trial testimony and record evidence as a whole, Respondent Budget respectfully submits that the General Counsel has failed to establish that Budget violated the Act as alleged. As such, the Complaint filed on Scolaro's behalf is subject to dismissal in its entirety.

Respectfully submitted this 6th day of December, 2018 on behalf of Respondent Budget
Rent a Car of Las Vegas.

Dated: December 6, 2018

Respectfully Submitted,

GORDON REES SCULLY
MANSUKHANI LLP

s/ Joseph P. Sbuttoni, III
James J. McMullen, Jr.
Joseph P. Sbuttoni, III
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that the **RESPONDENT'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE** in *Malco Enterprises of Nevada, Inc. d/b/a Budget Rent a Car of Las Vegas*, Case 28-CA-213222 was served via E-Gov, E-Filing, and E-Mail, on this 6th day of December 2018, on the following:

Via E-Gov, E-Filing:

Honorable Dickie Montemayor
Administrative Law Judge
NLRB Division of Judges, San Francisco Branch
901 Market Street, Suite 300
San Francisco, CA 94103-1779

Via Electronic Mail:

Dane Watson, In-House Counsel
Malco Enterprises of Nevada, Inc. d/b/a
Budget Rent a Car of Las Vegas
7135 Gilespe Street
Las Vegas, NV 89119-4267
[Email: d.watson@budgetlasvegas.com](mailto:d.watson@budgetlasvegas.com)

Nathan A. Higley
Counsel for the General Counsel
National Labor Relations Board, Region 28
300 Las Vegas Boulevard South, Suite 2-901
Las Vegas, NV 89101
Telephone: (702) 820-7467
Facsimile: (702) 388-6248
[Email: nathan.higley@nrlb.gov](mailto:nathan.higley@nrlb.gov)

Francine Scolaro
748 Whispering Palms Drive
Las Vegas, NV 89123-2306
[Email: frantasticlv@gmail.com](mailto:frantasticlv@gmail.com)

/s/ Joseph P. Sbuttoni, III
James J. McMullen, Jr.
Joseph P. Sbuttoni, III
Gordon Rees Scully Mansukhani
Attorneys for Respondent
101 W. Broadway, Ste. 2000
San Diego, CA 92101
[E-Mail: jsbuttoni@grsm.com](mailto:jsbuttoni@grsm.com)